NO. 72-1328

In the Supreme Court of the United States

OCTOBER TERM, 1972

UNITED STATES OF AMERICA,

Petitioner,

vs.

IRVING KAHN and MINNIE KAHN,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN
53 West Jackson Boulevard
Chicago, Illinois 60604
Attorneys for Respondents

UNITED STATES LAW PRINTING CO., CHICAGO, ILLINOIS 60618 (312) 525-6561

INDEX

AUTHORITIES CITED

Cases

Other Authorities

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1328

UNITED STATES OF AMERICA,

Petitioner,

vs.

IRVING KAHN and MINNIE KAHN,

Respondents.

On A Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit.

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

It is our submission hereinafter that Petitioner urges a statutory construction of Title 18, U.S.C. §2518(4)(a) in a manner contrary to its plain meaning and intendment.

On another Petition for a Writ of Certiorari arising out of the same case in the courts below and now pending in this Court under No. 72-1194, these Respondents (there, Petitioners) requested this Court to issue its Writ to review a divided opinion of the United States Court of Appeals for the Seventh Circuit reversing the United States

District Court, which found that the "marital privilege" applied under Title 18 U.S.C. §2517(4), and suppressed a communication between these Respondents, husband and wife.

The Government introduces its urging here for the grant of Certiorari on two separate grounds. It encourages this Court that the decision in this case is in conflict with decisions in other circuits. This urging it has elaborated on under Point 3 of its petition. We have also, hereinafter, discussed the government's cases—and other authority—under Point 3 to demonstrate no conflict.

The other urging of the government is that the decision of the Court of Appeals for the Seventh Circuit constitutes a construction of "an important new statute in a manner inconsistent with the language and intent of Congress . . . [which] . . . [i]f allowed to stand, . . . would severely undercut the effectiveness of court-authorized wiretapping, and thwart the congressional intent in permitting the use of this important law enforcement tool." (pp. 7-8, Petition) The government expansion on this urging is singular in that nowhere is presented the intent of the Congress, and the statutory words are submitted only to argue sublime subtleties neither implicit nor explicit in their clear context.

We agree with the government that wiretapping is an "important law enforcement tool." Probably the most important and intrusive that the Congress has ever authorized. Fully cognizant of its Constitutional implications, stringent limitations were attached to it, to narrowly avoid Constitutional conflict. All of those limitations were clearly designed for and addressed to the preservation of privacy.

In that recognition—which we will presume the government to concede—the limitations must be read narrowly, instead of the expansive, laissez-faire attitude we encounter on this Petition.

Recognizing, as we do, that the government never expands its initial urging that the Seventh Circuit decision conflicts with the language and intent of Congress, we hereinafter will respond to its first two points for what they appear to stress as reasons for granting the Writ.

1. (a) Initially, the government argues that wiretapping generally concerns "three classes of persons involved." The second generalization[1] is one that has no basis in any case of which we are informed, and becomes a "generalization" on the basis of this case alone.

But by the generalization the government attempts to "lump" the second "class" with the third class, to-wit: conversations of the named target with third persons. Of the third class, authorities abound. But the inter-identity of the second and third classes are neither self-apparent, nor does the government provide any rational inter-identification. Nor does the government explain how the third class sanctioning conversations between the named, identified person with "persons unknown" translates into unnamed-unidentified persons conversing with "persons unknown." We do not tarry with futile rationalizations on this enigma, but will proceed to the second submission of the government under Point 1.

---

[1] "Other known users of the target telephones, such as family members or other frequenters of the premises, about whom there is no probable cause to suspect complicity in criminal activity." (p. 8, Petition)

(b) Here the government submits that since the application under section 2518(1)(b)(iv) requires "the identity of the person, if known, *committing the offense* and whose communications are to be intercepted"—then 2518(4)(a) which requires specification in the interception order of "the identity of the person, if known, whose communications are to be intercepted" means such identification *only* if it is known that he or she is committing the offense. If, the government reasoning continues, it is not known whether he or she is committing the offense, he or she need not be named. In other words, the application for the Order is more restrictive than the Order; the Order in application is broader in enforcement than the application therefor. Stated baldly, the reasoning of the government is unconscionable. The government, then, likens the requirements for a search warrant to the interception authorization. We have never found a case where a search warrant is broader than the request, complaint or petition therefor.

(c) Under this sub-submission, the government seeks to identify the warrant to search premises with the authority to intercept communications, employing in part the "plain view" doctrine. It would seem their relied upon case (*United States* v. *Cox*, 10 Cir., 449 F. 2d 679), answers this question:

> "* * * This is, of course, an exception to the requirement that an object seized must be particularly described in the application for a warrant. Inasmuch as warrants for interception of electronic information generally follow the priciples applicable to search warrants, it is said that just as evidence not described but which is discovered by the officers in the course of a valid search is under certain circumstances admissible, so also intercepted conversations should be similarly treated.

"One difficulty in this is that the law on this plain view subject is not fully developed and also remains unclear. For example, in Marron v. United States, 275 U.S. 192, 48 S.Ct. 74, 72 L.Ed. 231 (1927), it was held that a search warrant must be executed strictly in accordance with its terms, leaving nothing to the discretion of the officer. It is argued that Harris v. United States, 331 U.S. 145, 155, 67 S.Ct. 1098, 91 L.Ed. 1399 (1945), modifies the *Marron* doctrine and that lower federal courts have considered *Harris* fully applicable to search warrant cases even though it had to do with seizure incident to arrest.

"Discussion in Coolidge v. New Hampshire recently decided, June 21, 1971, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564, succeeds in clarifying the 'plain view' doctrine. But the analogy is imperfect because the search for property is a different and less traumatic invasion than is the quest for private conversations." 449 F.2d 679, 686.

The government argument then continues that, while under a search warrant you must describe with particularity the premises to be searched and the articles to be seized, it is not essential that the owner of the premises be named. Therefore, argues the government, since the Congress did not *specifically* articulate that such identity is required in telephonic interception, non-identification is permitted. In answer to that submission, we submit that the Congress did so articulate in 2518(4)(a).[2]

It also overlooks the necessary requirement of a search warrant that it state "reason to believe" that the article(s) searched for will be found on the premises. *Aguilar* v.

---

[2] Even the Government cases regarding search warrants (*Hanger* v. *United States*, 8 Cir., 398 F. 2d 91 and *Dixon* v. *United States*, 5 Cir., 211 F. 2d 547), consider the naming of the owner or occupant of the premises "desirable".

Texas, 378 U.S. 108, 113. Such necessary requirement is no less basic where conversations are sought to be seized. No such showing was attempted here. There was here no statement of reasonable cause to believe that illegal conversations of Minnie Kahn would be obtained by interception.

2. This point calls on no authority for support save the dissent in the Court below, which, in turn, is equally without support in authority. Let us state the proposition differently. The government knows 4 occupants of a household. Two are teen-agers, the third a house-wife, and the fourth a suspect of illegal activities. The government's argument is that the authority to intercept number four connotes an authority to intrude upon the privacy of the other three. The abuses implicit in such a suggestion, the Constitutional implications, are patent, and are fully discussed under Points 1 and 3.

But the factual dissembling here is intolerable. It argues, as though a speculation, that Minnie Kahn *could* have been known as a member of the household. It was alleged that she *was* so known and the allegation was never put in issue. It argues that her use of the telephones on the premises *could* have been anticipated. It is ridiculous to suggest that such use by her—and her children—was not anticipated.

And if—as the government in its obtuse argument suggests—her involvement in the gambling enterprise could only be known by interception—there was no reasonable grounds for the intrusion, and the Fourth Amendment forbids it, as well does section 2518(4)(a).

3. The Government misinterprets the identity requirement of Title 18, United States Code, §2518(4)(a). That reads in pertinent part:

"(4) Each order authorizing or approving the interception of any wire or oral communication shall specify—

"(a) the identity of the person, if known whose communications are to be intercepted; . . . ."

The legislative history reemphasizes the requirements of sub-paragraph (a):

"Subparagraph (a) requires the order to specify the identity, if known, of the individual whose communications are to be intercepted." *U.S. Code Congressional and Administrative News,* 90th Congress, 2nd Session, 1968, Vol. 2, page 2191.

The Government asks this Court to accept an interpretation of this language, which we submit is eminently clear, into something which the Congress clearly did not intend. Under that facile reconstruction, the statute would read:

"(a) . . . the identity of the person, if known [to be a lawbreaker], whose communications are to be intercepted; . . ." (Bracketed portions reflect the government's interpretation.)

It is clear this changes the sense of the statute, and is clearly amendatory. But reconstruction of legislative history above, cannot be changed so cavalierly. "[T]he identity, if known, of the individual whose communications are to be intercepted" does not admit a construction of an added requirement of identity of the known person's occupation. Minnie Kahn's identification as a person was known, and so the Courts below recognized.

"The judge, in granting the motion, had before him the government's failure to deny that it knew Minnie Kahn was an occupant of the Kahn home and accordingly would use the home phones. We agree with the judge's finding and we hold that the wiretap order did

> not authorize interception of Minnie Kahn's conversations as she was neither identified in the order nor was she within the class of 'others as yet unknown.' " (Petitioner's Brief, App. 8a)

The contention of the Government now that "if known" so qualified the first requirement under the statute as to make it a nullity is an intolerable "analysis". The government interpretation is that Judge Campbell, who entered the intercept order, knowing the identity of four persons who were members of the household on Four Winds Way were using the telephone; that, though known, there was no reasonable reason to believe that they (Minnie Kahn, Pamela Kahn, and Howard Kahn) were using the phone for illegal purposes; that the order authorized intrusion on their conversations, not because their identities were unknown, but because it was not known whether they might not be using the phone in violation of law. It is inconceivable to us that such a reasoning can be attributed to Judge Campbell in issuing the order.

Further, the requirements of (a) were, according to the legislative history, included to satisfy the message conveyed in *West* v. *Cabell*, 153 U.S. 78, which stands for the proposition that the private intention of the magistrate is not a sufficient substitute for the constitutional requirement of a particular description in the warrant. 153 U.S. at 87.

Known, as it was, the members of the household, and the inescapable conclusion that the phone is available to all members for their use, it is inconceivable that the intent of the order was that that phone should be monitored when only the other members of the household were on the premises, as happened here. We refuse to believe that Judge Campbell would have issued an order authorizing the

interception of the telephone calls of Irving Kahn "and, when he is absent from the premises, the telephone calls of any other member of the household."

The Government argument that under the statute parties violating laws do not have to be specified if they are not known, and, therefore, the statute, *sub silentio,* authorizes omission of identity of known persons if it is unknown whether they are violating laws, is syllogistic nonsense.

The Government also submits to this Court that Certiorari should be granted for the reason that the decision here conflicts with that of the Second Circuit in *United States* v. *Fiorella,* 468 F. 2d 688. We submit it does not so conflict.

In *Fiorella,* the Court expressed the issue that the authorization of interception of six named persons "and *others yet unknown*" did not, because of the addition of the italicized words, convert the authorization into a general warrant, and continued:

> "The statute, 18 U.S.C. §2518(4)(a), however, only requires that the order specify 'the identity of the person, if known, whose communications are to be intercepted.' " 468 F.2d 688, 691.

This is exactly the holding of the Seventh Circuit:

> "Where, as here, the government's application and affidavit disclosed sources from which it could probably have learned the likelihood that Minnie Kahn was using the Kahn phones in illicit activity, but neither made the attempt, nor stated facts justifying not attempting, to gain that knowledge, the subsequent wiretaps amounted to a virtual general warrant in violation of her Fourth Amendment right." (Pg. 12A Government Petition)

The issues in the cases are inapposite, and do not become conflicting because of the extra-contextual quoting of similar words used.

The Government also urges as a reason for granting the Writ that the decision conflicts with the reasoning of two cases known as *United States* v. *Cox,* the earlier from the Tenth Circuit, 449 F.2d 679, the latter from the Eighth Circuit, 462 F. 2d 934. The earlier case was clearly distinguished by the Seventh Circuit in its decision.

> "It might be questioned whether conversations of Minnie Kahn could be lawfully seized had the government after proper investigation determined that no other persons in the household—other than Irving Kahn—had used the phones in committing crimes, and intercepted Irving Kahn's conversations only to find Minnie Kahn discussing with him an illegal enterprise. The suppositious question presupposes no prior knowledge of any unlawful activity by Minnie Kahn and no basis on which to include her in the application and affidavit class of 'others as yet unknown' who had in the past used or were presently using the phones for conversations regarding the offense. The question is not relevant to the question before us. However, we think the evidence seized in such an event might be used in the prosecution of Irving Kahn, but not against Minnie Kahn. There is a distinction between the event supposed in this question and the question arising where, for example, a valid tap on a named person concerning a particular offense uncovers evidence against another person of a different offense. United States v. Cox, 449 F.2d 679 (10th Cir. 1971).
>
> • • •
>
> "Neither does United States v. Cox, supra, aid the government. There the order specified narcotics violation, and conversations about bank robbery were monitored. The court found no constitutional error in the use of the conversations at the bank robbery trial." (Pg. App. 13a § 14a Government's Petition)

Further in that case there was authority to intercept wire communications to and from a *telephone number* listed in the name of Leonard E. Richardson without identifying the person, if any was known, whose conversations were to be monitored. On a subsequent trial, a phone conversation was introduced to which Leonard E. Richardson was not a party. The Government suggests this is an authority for listening in to the phone conversations of Minnie Kahn. There was in that case no inquiry into the question of whether 18 U.S.C. §2514(4)(a) was satisfied, and therefore we, like the Court of Appeals, "are at liberty to presume that all of the proceedings followed were in accordance with the statute since the defendant did not find fault with any of these occurrences." 449 F. 2d at 681. This case is no authority for the government position.

In the latter *Cox* case, the issue concerned the failure to minimize interception. That case was defined by the Court as "an organized criminal conspiracy" (462 F. 2d at 1300). The Court tacitly admitted some intercepted conversations went beyond the realm of relevancy, but concluded that the farflung nature of the investigation warranted the excesses, and referred to the legislative history:

> "Accordingly, we turn to the Act's provisions and history which, when read together, indicate that the minimization requirement of 18 U.S.C. § 2518(5) is nothing more than a command to limit surveillance as much as possible in the circumstances, *i. e.*, the minimization question must be considered on a 'case-by-case basis. . . .' Senate Report No. 1097, 1968 U.S. Code Cong. & Adm. News, at 2190.
>
> "[4] In making this case-by-case inquiry, we also must be mindful that the statute's framers recognized that interceptions which might be excessive in some circumstances might be appropriate in others." 462 F.2d 1293 at 1300.

We invite more appropriately the Court's attention to *United States* v. *Vega*, E.D.N.Y., 52 F.R.D. 503, 506-7.

> "It appears to this court that the supporting affidavit demonstrated the right to seize telephone conversations between the defendant Vega and any third party which related to the possession, sale, distribution or concealment of narcotics. No showing is made for the seizure of the conversations of Barbara Titus, in whose name the telephone stood. Absent proof that the defendant Vega used the telephone in his narcotics business, the wiretap order could not have issued. Yet the subject order permits the seizing of all telephonic communications over telephone number 654-0186.
>
> "The court finds the order too broad and lacking in the particularity required by both the state and federal statutes."

We suggest to the Court that this case is very similar in import to this Court's reasoning in *Katz* v. *United States*, 389 U.S. 347. Admittedly in *Katz* the reversal was not because there was not reasonable grounds that the interception of Katz's calls would have been authorized had a proper authority been appealed to, but rather because the interception of his calls was without authority. But it is inconceivable that the other persons using that public booth could have been eavesdropped upon had an order been applied for. As this Court noted in the *Katz* case "the agents confined their surveillance to the brief periods during which he [Katz] used the telephone booth, and *they took great care to overhear only the conversations of the petitioner himself.*" 389 U.S. at 354. (Our emphasis)

As this Court noted in that case, and as should be reemphasized, the Fourth Amendment protects people—and not simply "areas"—against unreasonable searches and seizures. 389 U.S. 353.

Therefore, irrespective of the action this Court takes in connection with the pending Petition by these Respondents for the review of other questions in this case, the instant Petition for a Writ of Certorari should be denied.

Respectfully submitted,

EDWARD J. CALIHAN, JR.
ANNA R. LAVIN,
Attorneys for Respondents.